MAR 1 2002

No. 01-1114

IN THE

Supreme Court of the United States

DAVID WINTERS, *et al.*,

Appellants,

v.

ILLINOIS STATE BOARD OF ELECTIONS, *et al.*,

Appellees.

ON DIRECT APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

MOTION OF APPELLEE JOHN TULLY TO DISMISS OR AFFIRM

WILLIAM J. HARTE*
WILLIAM J. HARTE, LTD.
111 West Washington
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

DAVID W. ELLIS
WILLIAMS, COLLINS & BAX, P.C.
20 North Wacker Drive
Suite 3230
Chicago, Illinois 60606
(312) 372-3311

Counsel for Appellee John Tully

* *Counsel of Record*

172631

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED FOR REVIEW

Whether the United States District Court for the Northern District of Illinois properly determined that the provision in the Illinois Constitution for the selection method to choose the ninth member of the Illinois Legislative Redistricting Commission does not violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iv
Overview of the Motion	1
Statement of the Case	3
I. Nature of the Case	3
A. The Illinois Constitution's Provision for Legislative Redistricting	3
B. Appellants' Claims Before the Three-Judge District Court	4
C. The Court's Opinion Below	5
Argument	6
A. Section 3(b) Does Not Impinge Upon The Fundamental Right To Vote And Is Not Subject To Strict Scrutiny.	6
1. Article IV, § 3 Does Not Implicate Any Fundamental Right, Let Alone The Right to Vote	6
2. The Right To Vote Is Not Impacted By Article IV, § 3	8

Contents

Page

3. The Tie-Breaker Provision Is Rationally Related To A Legitimate Governmental Interest. 12

4. The Tie-Breaker Provision Is Not Outcome-Determinative. 17

B. The Equal Protection Claim Is Without Merit 19

1. Appellants Lack Standing To Raise An Equal Protection Claim 20

2. Appellants Do Not, And Cannot, Establish An Equal Protection Violation 22

Conclusion 25

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Cases:

Adarand Constructors, Inc. v. Mineta, __ U.S. __,
122 S. Ct. 511 (2001) 21

Anderson v. Celebrezze,
460 U.S. 780 (1983) 10

Bennett v. Spear,
520 U.S. 154 (1997) 21

Burdick v. Takushi,
504 U.S. 428 (1992) 10, 12

City of Cleburne v. Cleburne Living Center,
473 U.S. 432 (1985) 22

Dunn v. Blumstein,
405 U.S. 330 (1972) 11

Growe v. Emison,
507 U.S. 25 (1993) 14

Harper v. Virginia State Bd. of Elections,
383 U.S. 663 (1966) 11

Harris v. McRae,
448 U.S. 297 (1980) 11

Moore v. East Cleveland,
431 U.S. 494 (1977) 8

Cited Authorities

Page

New State Ice Co. v. Liebmann,
285 U.S. 262 (1911) 14

Nordlinger v. Hahn,
505 U.S. 1 (1992) 11

Page v. Bartels,
248 F.3d 175 (3d Cir. 2001) 15

Palko v. Connecticut,
302 U.S. 319 (1937) 8

Plyler v. Doe,
457 U.S. 202 (1982) 11

Reeves, Inc. v. Stake,
447 U.S. 429 (1980) 14

Reno v. Flores,
507 U.S. 292 (1993) 7

Reynolds v. Sims,
377 U.S. 533 (1964) 11, 12

Rodriguez v. Popular Democratic Party,
457 U.S. 1 (1982) 10, 12, 14

San Antonio Independent School Dist. v. Rodriguez,
411 U.S. 1 (1973) 10

Sinkfield v. Kelley,
531 U.S. 28 (2000) 20

Page

Washington v. Glucksberg,
521 U.S. 702 (1997) 6, 7, 11

Wesberry v. Sanders,
376 U.S. 1 (1964) 11

Winters v. Illinois State Board of Elections,
2001 WL 1491581 (N.D. Ill. 2001) ..... *passim*

STATE CASES

People ex rel. Burris v. Ryan,
588 N.E.2d 1033 (Ill.1992) 19

People ex rel. Engle v. Kerner,
210 N.E.2d 165 (Ill. 1965) 18

People ex rel. Scott v. Grivetti,
277 N.E.2d 881 (Ill. 1971) 18

Schrage v. State Board of Elections,
430 N.E.2d 483 (Ill. 1981) 19

STATE STATUTES, CONSTITUTIONAL PROVISIONS, AND OTHER AUTHORITIES

IV Record of Proceedings, Sixth Illinois Constitutional Convention 13

Alaska Const., art. VI, § 8(b) 14

Ill. Const. 1970, Art. IV, § 3(b) ..... *passim*

Iowa Const., art. III, § 35 15

Cited Authorities

	Page
Mich. Const., art. IV, § 6	15
Mont. Const., art. V, § 14(2)	14
N.J. Const., art. 4, § 3	14, 15
Penn. Const., art. II, § 17(b)	14
Wash. Const., art. 2, § 43(6)	15

Appellee John Tully hereby moves this Court, pursuant to Supreme Court Rule 18.6, to dismiss this appeal or to affirm the decision of the three-judge panel of the United States District Court for the Northern District of Illinois.

OVERVIEW OF THE MOTION

Appellants seek to have this Court review a decision of the three-judge panel in the district court that rejected Appellants' challenge to the constitutionality of Article IV, Section 3(b) of the Illinois Constitution: the November 20, 2001 opinion issued in this case, *Winters v. Illinois State Board of Elections*, Nos. 01 C 50229 and 01 C 6566, 2001 WL 1491581 (N.D. Ill. 2001), and granting the motions for judgment on the pleadings by defendants-appellees. (*See* Appendix A, Winters Jurisdictional Statement.)

The opinion of the three-judge panel, which unanimously rejected the claims of the Appellants, should be affirmed. The Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment apply to, and govern, the content of the ultimate plan for redistricting adopted by a state, but neither of these Clauses has ever been held to invalidate, much less apply to, the content of the *body* that draws the plan. The Equal Protection Clause, in particular, has been held to prohibit vote dilution as well as racial and political gerrymandering. But the Appellants simply claim that Illinois' method for composing its Legislative Redistricting Commission ("the Commission") is invalid. To support this proposition, Appellants cite case law pertaining to one-person, one-vote and racial and political gerrymandering cases to claim that they have a fundamental right to have the Commission composed in a particular way. The question presented is whether Appellants possess a fundamental right to a certain composition of the Commission by a certain procedure. As the three-judge panel properly held:

"The answer to that is obviously, 'Of course not.'" *Winters*, 2001 WL 1491581 at * 3.

In any event, the State of Illinois' method for drawing its state redistricting scheme is a rational and logical method that easily satisfies the rational-basis test. In the event that the partisan, eight-member Commission — composed of four Democrats and four Republicans — fails to timely approve a redistricting plan, a ninth member is chosen by a random drawing from a pool of two candidates, not of the same political party. The clear point is that, during its deliberations, the eight-member Commission does not know the political affiliation of the so-called "tie-breaker," so that the Commission has the incentive to compromise, rather than risk an individual from the opposing political party casting the tie-breaking vote. Illinois' scheme is a rational one, and indeed better, as the court below noted, than those in other states where the tie-breaking vote can be predicted beforehand (because the "tie-breaker" is a particular individual or body whose political affiliation is known all along, such as the state's governor). Regardless of its comparison to other states, the State of Illinois has chosen a reasonable, rational method for composing the members of its redistricting body.

The redistricting process is an inherently political exercise, and this Court has often held that the judiciary should be reluctant to entangle itself in such matters absent a clear violation of the Constitution or statutes. Here, the final plan for redistricting the Illinois House and Senate adopted by Illinois is not even challenged in the Amended Complaint as violating the Constitution. This Court should not, for the first time, embroil itself in dictating to the states how they must compose their redistricting bodies. The judiciary was never intended to be anything but a means of last resort in redistricting matters, where the state political

process has either wholly failed to enact a plan or has enacted one that violates the Constitution or the Voting Rights Act. None of those facts are even alleged to exist here. The three-judge panel's ruling should be upheld.

STATEMENT OF THE CASE

I. Nature of the Case

A. The Illinois Constitution's Provision for Legislative Redistricting

At issue below was the constitutionality of the Illinois Constitution's provision for legislative redistricting. The people of the State of Illinois approved and enacted the current Illinois Constitution in 1970. Article IV, Section 3 of the Illinois Constitution governs redistricting of the Illinois House and Senate. Under that provision, in the year following each federal decennial census, the Illinois General Assembly is empowered by law to redistrict the Legislative (Senate) and Representative Districts. Ill. Const. 1970, Art. IV, § 3(b).

In the event the General Assembly fails to enact a plan, signed by the Governor, by June 30 of that year, a Legislative Redistricting Commission is formed by July 10. The Commission is composed of eight (8) members, two each appointed by the Speaker of the House, the Minority Leader of the House, the President of the Senate, and the Minority Leader of the Senate — in each case, one appointee is a member of the respective chamber, the other a public (*i.e.* unelected) member. The Constitution provides a deadline of August 10 for the Commission to approve a redistricting plan by a vote of five (5) members. If the Commission fails to do so, the Supreme Court of Illinois shall submit the names of two individuals, not of the same political party, to the

Illinois Secretary of State by no later than September 1.[1] The Secretary of State shall then draw, by random selection, the name of one of those two individuals to serve as the ninth member of the Commission. The Commission, composed of nine members, shall then approve a plan by October 5. The Supreme Court of Illinois is given original and exclusive jurisdiction over redistricting challenges. *Id.*

B. Appellants' Claims Before the Three-Judge District Court

Appellants filed suit below, challenging the constitutionality of Article IV, Section 3 of the Illinois Constitution — specifically, the manner in which Illinois breaks a deadlock on its eight-member Legislative Redistricting Commission to draw a plan for redistricting the Illinois House and Senate. Appellants did *not* allege that the ultimate plan adopted by the Commission violated any constitutional provision. That is, they did *not* allege that the final plan approved by the Commission violated the one-person, one-vote principle, or that it constituted a racial or political gerrymander, or even that it violated the Voting Rights Act.

Appellants did *not* allege that a tie-breaking mechanism, *per se*, was unconstitutional. Nor did they allege that the use of a partisan tie-breaker was unconstitutional. Rather, just as they do before this Court, Appellants alleged *only* that the manner in which that tie-breaking vote was selected was unconstitutional. That is, they focused solely on the Illinois

1. The Illinois Constitution simply provides that each of the two individuals selected for the random-selection pool be "not of the same political party." Ill. Const. 1970, Art. IV, § 3(b). It does not require that one individual be a Democrat and one a Republican, nor does it require that the individuals have any identified partisan affiliation whatsoever — provided that they are not of the same political party.

Constitution's provision that requires that the potential ninth member, if necessary, be chosen by random selection from two people, not of the same political party, selected by the Illinois Supreme Court. Under that provision, while the eight-member Commission (composed equally of each major political party) deliberates, the potential ninth member is unknown — most significantly, of course, the partisan affiliation — if any — of that individual is unknown. If and only if the eight-member Commission fails to approve a plan, a ninth member is chosen by lot, from a pool of two candidates not of the same political party. Simply put, the eight-member Commission does not know which political party will gain a majority of the Commission — or whether *either* party will gain the five-member majority — until after their deadline passes, giving each party an incentive to avoid the risk of uncertainty by compromising on a plan.

Appellants argued below that this random-selection procedure violated their "fundamental rights" and demanded strict scrutiny accordingly. They also claimed a violation of equal protection, as well as a violation of procedural due process.

C. The Court's Opinion Below

The three-judge panel below entered judgment on the pleadings against Appellants on all counts and, in doing so, made it clear that they did not even come close to proving their case. On the substantive due process claim, the court wrote: "'Is there a fundamental right to have the tie-breaking vote member of a redistricting commission chosen by some means other than by lot?' The answer to that is obviously, 'Of course not.'" *Winters*, 2001 WL 1491581 at * 3. The court applied the rational-basis test, "[a]s no other fundamental right is arguably implicated," *id.*, and rejected that claim.

The court found that the equal protection claim "merits little discussion" and "does not apply in the first instance because the tie-breaking provision does not create any sort of classification whatsoever." *Id.* at * 13. Appellants do not press their procedural due process claim before this Court; in any event, the court below wrote that it "fails to see how the tie-breaking provision implicates" procedural due process and rejected that claim as well. *Id.* at * 12.

ARGUMENT

A. Section 3(b) Does Not Impinge Upon The Fundamental Right To Vote And Is Not Subject To Strict Scrutiny.

The court below properly rejected Appellants' attempts to cast this case in terms of the fundamental right to vote. Article IV, § 3 of the Illinois Constitution does not impact the right to vote in any practical way whatsoever. To the extent even an abstract, attenuated connection could be made between the tie-breaking provision and the right to vote, it is nowhere near the impact necessary to trigger strict scrutiny. The court below properly utilized the rational-basis test and upheld Article IV, § 3.

1. Article IV, § 3 Does Not Implicate Any Fundamental Right, Let Alone The Right to Vote

The "liberty" component of the Due Process Clause of the Fourteenth Amendment is obviously broadly worded. This Court has long recognized that, when faced with an attempt to invoke a "fundamental right," the Court should be "reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Thus, this Court has

"required in substantive due process cases a 'careful description of the asserted fundamental liberty interest.'" *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 303 (1993)). In *Glucksburg*, for example, where plaintiffs challenged the state of Washington's ban on assisted suicide, plaintiffs and the *en banc* court below termed the "liberty" interest broadly as the right to "control the time and manner of one's death," the "right to die," and the right "to control of one's final days." *Glucksburg*, 521 U.S. at 709, 722. This Court, however, more carefully framed the alleged fundamental right as the right "to commit suicide which itself includes a right to assistance in doing so." *Id.* at 723.

Before carefully framing the relevant "fundamental right" at issue, it is critical to consider what Appellants allege and — more significantly — what they do *not* allege. Appellants do not argue that the provision directing the General Assembly to enact a redistricting plan is unconstitutional. Nor do they challenge the provision that allows an eight-member Commission to approve a plan — indeed, the Commission as initially composed achieves the perfect balance between political parties, public members versus elected officials, and House versus Senate appointees. Significantly, Appellants do not challenge the use of a tie-breaking mechanism as a general proposition. In fact, they do not even challenge the use of a *partisan* tie-breaker. *See* Jurisdictional Statement ("Jurisd. Stmt.") at 12-13 (favorably referring to other states' use of tie-breaking mechanisms which use the state's supreme court, governor, or other public figure). In other words, Appellants do not claim that the use of a tie-breaking vote cast by a person who is identified by his or her political affiliation violates their constitutional right to vote.

In sum, because they do not allege that their right to vote is infringed based on the use of a partisan tie-breaker, but only by a partisan tie-breaker drawn *at random*, Appellants'

attack is clearly focused on nothing more than the selection process itself, and not on the "right to vote." Thus, the court below was correct in framing the alleged fundamental right as the "fundamental right to have the tie-breaking member of a redistricting commission chosen by some means other than by lot." *Winters*, 2001 WL 1491581 at * 3. As the court correctly reasoned, "interpreting the tie-breaking provision as falling under the umbrella of the right to vote in this way is premised on a much more abstract notion of the right than the Supreme Court's substantive due process jurisprudence allows." *Id.*

It should go without saying that this alleged "right" to a tie-breaking mechanism, free of random selection, falls far short of a right "deeply rooted in this Nation's history and tradition," *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977), or "implicit in the concept of ordered liberty." *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). As the court below succinctly put it, answering the question of whether such a fundamental right exists: "'Of course not.'" *Winters*, 2001 WL 1491581 at * 3. Appellants have not established the existence of a fundamental right in this matter.

2. The Right To Vote Is Not Impacted By Article IV, § 3

Appellants understandably seek to dress up their alleged "fundamental right" as the fundamental right to vote. This argument is without merit for two reasons. First, the right to vote is not implicated at all by the tie-breaker provision of Article IV, § 3. Second, the right to vote is not a fundamental right *per se*, and to the extent that a remote, attenuated connection can be made between the tie-breaker provision and an Illinois citizen's right to vote, that extremely remote "infringement" clearly does not compel strict scrutiny.

Though Appellants allege that the tie-breaker provision burdens their fundamental right to vote, they provide literally no argument in support of this contention. They make no attempt to connect a constitutional provision that breaks a deadlock in the Commission with the right to vote. Clearly, Article IV, § 3 does not impact ballot access. It does not impose requirements on eligibility to vote. It does not affect access to the polls. It does not call for the filling of vacancies between elections. It does not disqualify citizens from serving as election judges. It does not impede the ability of voters to vote for write-in candidates. It does not require that redistricting be based predominately on race. It does not violate the one-person, one-vote guarantee (indeed, paragraph (a) of Article IV, § 3 requires that districts be "substantially equal in population").

The only plausible connection that can even be inferred from Appellants' arguments is that the redistricting plan, *once drawn*, will disadvantage the "losing" political party and somehow affect the rights of people who vote for that political party. Putting aside the fact that this is an extremely speculative claim, the fact remains that Appellants have not made this allegation. They do not attack the end result of the plan. They do not allege political gerrymandering. Nor would they even have standing to do so, for the Amended Complaint does not allege that any of the Appellants are citizens, or legislators, belonging to a particular political party. (Amended Complaint, ¶¶ 4-7.) Absent such allegations of impact on voters or legislators of a particular political party, there is absolutely no connection whatsoever between the tie-breaking provision and the right of an Illinois citizen to cast a vote. There is no allegation, much less a logical basis, to even suggest that an Illinois voter is "impacted" in any way by the tie-breaking provision.

Moreover, even if a minimal, attenuated impact on the right to vote were present, strict scrutiny is not applicable. "The 'right to vote, *per se*, is not a constitutionally protected

right.'" *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (quoting *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)). This Court has properly and repeatedly recognized that *any* election law or regulation could be interpreted as imposing *some* burden on individual voters, but "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to serve a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *see also Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983).

To the contrary, this Court has adopted a more flexible approach to reviewing alleged restrictions on the right to vote. Where the alleged impact on the right to vote is minimal, or reasonable and nondiscriminatory, a rational-basis test applies. *Burdick*, 504 U.S. at 434. This Appellee has already demonstrated above that, even crediting everything alleged by Appellants, if any "restriction" on the right to vote exists at all, it is a faint, remote one. Certainly, the tie-breaker provision cannot be equated with such restrictions as poll taxes, onerous signature requirements for third-party candidates, or the like. Indeed, the tie-breaker provision is far less "burdensome" on a citizen's right to vote than was Hawaii's complete ban on write-in voting (which this Court upheld in *Burdick*, 504 U.S. 428) or Puerto Rico's law allowing only the incumbent political party — and not the voters — to fill mid-term vacancies for a member of the House of Representatives (which this Court upheld in *Rodriguez*, 457 U.S. 1).

Painting with an unreasonably broad brush, Appellants argue that the "fundamental right to vote encompasses redistricting matters" and cite to many cases concerning fundamental rights. (Jurisd. Stmt. at 10-12.) It is true in a

general sense that a fundamental right to vote exists, but it is clearly not true that such a right is implicated in the context of this case. As discussed above, the fundamental right to vote can be impacted by the content of the final redistricting plan adopted by a state, but no court has ever held that the Constitution is offended by the particular content of the *body* that drew the plan. Appellants' case citations are patently distinguishable in this regard. In *Wesberry v. Sanders*, 376 U.S. 1 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court considered reapportionment plans that violated the one-person, one-vote principle because the populations of certain districts varied wildly from others, resulting in vote dilution. *Dunn v. Blumstein*, 405 U.S. 330 (1972), and *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966), involved state laws that had the effect of literally turning people away from the polling places; hardly a more direct impediment on the right to vote could take place. *Dunn* involved a requirement that voters must have lived in the state for a year, and in the relevant county for three months. *Harper* involved a poll tax that shut out indigent, and predominantly minority, voters.

The other cases cited by Appellants had nothing to do with the right to vote. *See Plyler v. Doe*, 457 U.S. 202 (1982) (involving the right of illegal aliens to a public education); *Washington v. Glucksberg*, 521 U.S. 702 (1997) (the alleged right to assistance in committing suicide); *Harris v. McRae*, 448 U.S. 297 (1980) (the alleged right to federal funding of abortions); *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (the alleged right of new home purchasers to the same property tax basis as existing homeowners). Indeed, this Appellee cited *Glucksberg* above for the proposition that the courts must be careful to narrowly frame the alleged "fundamental right" at issue, so as to avoid what Appellants attempt to do here — sweep with a broad brush, and argue that *any* law that pertains in *any* way to reapportionment should be read to so dramatically impair the "right to vote" as to trigger strict scrutiny.

The three-judge panel correctly reasoned that this Court has receded "from its strict categorical approach to the right to vote." *Winters*, 2001 WL 1491581 at * 3 (comparing *Reynolds* with *Rodriguez* and *Burdick*). The three-judge panel correctly found that the right to vote was not implicated and that "no other fundamental right is arguably implicated," and applied a rational-basis test accordingly. *Id.*

Because no fundamental right is implicated by the tie-breaker provision of Article IV, § 3, and because that provision imposes, at best, an extremely remote burden on the right to vote, the highly deferential rational-basis standard governs this Court's analysis.

3. The Tie-Breaker Provision Is Rationally Related To A Legitimate Governmental Interest.

The tie-breaker provision of Article IV, § 3 of the Illinois Constitution easily survives rational-basis scrutiny. As the three-judge panel found, "No one seriously doubts the State of Illinois has a legitimate interest in legislative redistricting." *Winters*, 2001 WL 1491581 at * 4. Even Appellants acknowledge as much. (Jurisd. Stmt. at 12.) Thus, the State of Illinois need only demonstrate that its tie-breaker provision is rationally related to that legitimate governmental interest.

As discussed in more detail above, the use of the tie-breaking ninth Commission member arises only in the case of last resort at the map-drawing level, after both the General Assembly and the eight-member Commission have failed to produce a redistricting plan. In fact, the framers of the Illinois Constitution, whose work was ratified by the people in the 1970 election, clearly intended that the tie-breaking provision would serve as a catalyst for compromise within the eight-member Commission. The framers recognized the possibility

of designating a specific tie-breaker (e.g. the governor, or the state supreme court's chief justice), but specifically wanted the eight-member Commission to operate without knowing the political affiliation of that ninth member:

> The object of the reapportionment plan . . . is to reduce both political parties to a state of equivalency. We believe we achieve this by utilizing the random selection method of achieving a tie-breaker, where neither party could look ahead with certainty as to a potentional [sic] tie-breaker being more in line with their opinions than with the other party's opinions.
>
> [W]e believe we have adopted the most sensible [tie-breaker redistricting scheme] in that it does not at any stage give the impetus to one party or the other to stalemate, because it can look to the tie-breaker system and figure out that it might have a better advantage further down the road.

IV Record Of Proceedings, Sixth Illinois Constitutional Convention, at 2955, 2956 (July 21, 1970) (statements of Delegate Sommerschield).[2]

Thus, while Appellants complain that the tie-breaking vote is determined by "chance," in fact this was the precise purpose of the provision. The framers rationally and logically reasoned that if the eight-member Commission knew the identity of the potential ninth member beforehand, they would

---

2. As the court below ruled based on cross-motions for judgment on the pleadings, the court struck all of the exhibits attached to the pleadings filed by the Appellants, with the exception of the verbatim transcripts from the Sixth Illinois Constitutional Convention, of which the court took judicial notice without converting the motions into ones for summary judgment. *Winters*, 2001 WL 149581 at * 2.

undoubtedly know his or her political affiliation as well, and the party to which the ninth member belonged would have no incentive to compromise with the "minority" party in the original eight-member Commission.[3]

Indeed, the court below correctly noted that Illinois' tie-breaker provision "may even be more rational than the procedures found in other states." *Winters*, 2001 WL 1491581 at * 4. For example, some states that break deadlocks in their redistricting commissions allow the tie-breaking member to be picked by the state supreme court, or its chief justice. *See, e.g.*, ALASKA CONST., art. VI, § 8(b) (chief justice selects); MONT. CONST., art. V, § 14(2) (chief justice selects); N.J. CONST., art. 4, § 3 (chief justice selects); PENN. CONST., art. II, § 17(b) (supreme court selects by majority vote).

As one example, New Jersey has a tie-breaker provision similar to that of Illinois. New Jersey's constitution provides for a 10-member Apportionment Commission: five

---

3. Appellants complain that history has not borne out this reasoning. They quickly gloss over the fact that, in 1970, the eight-member Commission did, in fact, achieve compromise without resorting to a tie-breaker. (Amended Complaint, ¶ 31; Jurisd. Stmt. at 6, n.2.) Moreover, while it is true that in the last three redistricting cycles, a ninth member of the Commission was necessary to approve a map for the Illinois House and Senate, it does not follow that this makes the reasoning arbitrary or irrational. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory" to attempt novel approaches to questions of politics and public policy. *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1911) (Brandeis, J., dissenting). Reapportionment involves thorny issues of public policy, and the judiciary has no place in the political thicket merely because a political judgment may not have worked as effectively as the people might have hoped. *See Growe v. Emison*, 507 U.S. 25, 34 (1993); *Rodriguez*, 457 U.S. at 8 (Puerto Rico's system, which allowed the incumbent political party to hand-pick a mid-term replacement, was entitled to "substantial deference").

Democrats and five Republicans. N.J. CONST., art. 4, § 3. If the commission fails to craft a map by a fixed date, the Chief Justice of the New Jersey Supreme Court appoints an eleventh member. *Id.* The 11-member commission must establish a redistricting plan, by majority vote, within 30 days. *Id.; see also Page v. Bartels*, 248 F.3d 175 (3d Cir. 2001). The Chief Justice, who is appointed by the governor, has unlimited discretion in selecting the eleventh member. *Id.*

The Illinois approach is a more thoughtful and impartial means of reaching a final districting plan at the Commission level because it eliminates the possibility of partisan politics in the selection of the ninth member. Here both Democrats and Republicans have an incentive to compromise, namely, the risk of losing the tie-breaker. In other states, the political party affiliated with the Chief Justice (or, in Pennsylvania with the Supreme Court majority) has no incentive to compromise, to the extent that it believes that the tie-breaker provision will likely work to its advantage.

Interestingly, Appellants concede the constitutionality of these tie-breaker provisions noted above, as well as those of other state constitutions, at page 13 of their Jurisdictional Statement. *See also* Iowa Const., art. III, § 35; Mich. Const., art. IV, § 6; Wash. Const., art. 2, § 43(6).[4] This is a telling concession on their part. Appellants concede the constitutionality of these seven constitutional provisions that break a commission deadlock by a predetermined individual or body, which either breaks the tie itself or chooses the tie-breaker. Yet these identified individuals are unquestionably as partisan as Illinois' ninth member, and the commission members of those respective states will undoubtedly

4. *See also* Jurisd. Stmt. at 12 (obviously including these states, with partisan tie-breaking provisions, as part of the "other 49 states . . . that do not violate the fundamental right to vote.")

recognize that individual's political affiliation. Thus, the only meaningful distinction between these other states' redistricting provisions and that of Illinois is a simple matter of timing — in the other states, the political affiliation is known *while* the commission deliberates, while in Illinois, the Commission does not know the political affiliation of the ninth member until *after* they have completed deliberations.

This is the only distinction between Illinois and these other states on this point, a simple matter of timing. Appellants misperceive this distinction as a weakness in the Illinois system and seek to drive a truck through this tiny hole they have created, lifting this minor distinction to one of a *constitutional* magnitude. They also briefly allude to the fact that these other states require "someone — whether it be the state supreme court, the governor, or other public figure — to be accountable for selecting the tie-breaker or choosing the plan." (Jurisd. Stmt. at 13.) But this "accountability" distinction is no distinction at all. The Illinois Supreme Court is every bit as accountable for its choice of two candidates for the random selection as are these other state supreme courts. The only difference is that the Supreme Court of Illinois provides two candidates, not one, but certainly the Court is accountable for either choice. The fact that Illinois does not allow its high court to pick only *one* person, or to select only *one* political party, like these other states, is a credit to Illinois. The Illinois Supreme Court could not engage in politics even if it were so inclined, whereas in states such as New Jersey, the chief justice can pick whomever he or she pleases. Illinois' system for choosing its tie-breaking member is far preferable to these other states, but it is not necessary for the Court to so hold. There can be no question that the choice that the people of the State of Illinois have made is a reasonable and non-arbitrary one, grounded in logic and common sense, and which is rationally related to its legitimate interest in legislative redistricting.

4. The Tie-Breaker Provision Is Not Outcome-Determinative.

Finally, Appellants go to great lengths to convince this Court that the moment the tie-breaking member is selected, the Illinois redistricting plan is a foregone conclusion. They argue that the selection of the ninth member "ensures one of the parties' total victory" and "dictates the process' conclusion. . . ." (Jurisd. Stmt. at 6, 16.) Appellants are flatly wrong in stating that the selection of the ninth member renders the result of the Illinois redistricting plan a foregone conclusion. First, the Illinois Constitution does not mandate that a Republican, or a Democrat, be placed into the pool of two candidates for random selection — it only requires that the two individuals must be "not of the same political party." Ill. Const. 1970, Art. IV, § 3(b). The two candidates could be politically affiliated with a party other than one of the two major parties, in which case the selected individual's participation as the ninth member would certainly not result in a "foregone conclusion."

Second, Appellants assume that all members of the Commission, both at the eight-member and nine-member levels, will automatically act in accordance with their partisan interests to the exclusion of all else. There is nothing in the Illinois Constitution that dictates that result, and Appellants concede that in 1970, the eight-member Commission compromised and agreed upon a plan for redistricting. (Amended Complaint, ¶ 31; Jurisd. Stmt. at 6, n.2.) Appellants cite no authority for the presumption that either the eight-member or nine-member Commission will consistently and exclusively act only to further the interests of their party.

Third, Appellants apparently assume that the Commission will be divided 4-4 at the eight-member level, where the ninth member (whom Appellants assume will be

either a Republican or Democrat) will cast the deciding vote. Again, there is no support in the record for such an inference. There is no limit in the Illinois Constitution to the number of redistricting plans that can be offered before the Commission, and it is entirely possible that the basis for the lack of a majority could be something other than an even 4-4 split: it is possible, for example, that 3 members could support Plan A, 3 members support Plan B, and 2 members support Plan C. In this event, it would be entirely plausible that the ninth member would not be a "tie-breaker" at all. It is possible, in the above example, that the ninth member would support Plan A (giving it four votes), but that the members supporting Plans B and C would join together for five votes — in which case the tie would be broken without the ninth member playing a decisive role. It is also entirely possible that, even with the ninth member, no redistricting plan would receive five votes, in which case the Illinois Supreme Court would assume its role and intervene to effect a plan for redistricting. *See People ex rel. Engle v. Kerner*, 210 N.E.2d 165 (Ill. 1965) (after the General Assembly failed to pass a plan for redistricting the senate, the Supreme Court adopted its own plan for redistricting the senate).

Fourth, even assuming that partisan concerns will always govern the votes of all members of the majority party on the Commission, and assuming that the ninth member's participation will inevitably and decisively lead to a partisan map approved on a 5-4 party-line vote — unsupported assumptions, all of them — the fourth step of the process of legislative redistricting in Illinois is review by the Illinois Supreme Court, which has proven to be anything but a "rubber stamp" since the adoption of the 1970 Constitution. The Illinois Supreme Court invalidated the 1970 plan, adopted by an eight-member Commission, because the Commission was unlawfully comprised — it failed to include public members. *People ex rel. Scott v. Grivetti*, 277 N.E.2d 881 (Ill. 1971). The Illinois Supreme Court redrew portions

of the 1980 plan, adopted by a nine-member Commission, because the districts did not satisfy the state-law requirement that districts be "compact." *Schrage v. State Board of Elections*, 430 N.E.2d 483 (Ill. 1981). The Illinois Supreme Court refused to accept the original 1991 plan for redistricting passed by the nine-member Commission and remanded the plan to the Commission for more extensive factual findings. *People ex rel. Burris v. Ryan*, 588 N.E.2d 1033 (Ill. 1992).

Thus, even if Appellants were correct that Illinois' use of a tie-breaking ninth Commission member preordains the map that will be drawn — and in a way constitutionally distinguishable from other states that use partisan tie-breakers as well — the fact remains that the Supreme Court of Illinois stands as a final safeguard to ensure the passage of a constitutional plan for redistricting.

Appellants' substantive due process claim rests on the false premise that they possess a fundamental right to a certain procedure for choosing a tie-breaking member of a redistricting commission. Because no such right exists, and because the "burden" allegedly imposed by Illinois' tie-breaker provision is minimal, if it exists all, on the voting rights of Illinois citizens, this Court's analysis is governed by the rational-basis test. The tie-breaking provision easily satisfies this standard. This Court should affirm the judgment below.

B. The Equal Protection Claim Is Without Merit

Finally, Appellants allege a violation of the Equal Protection Clause of the Fourteenth Amendment, based on a theory that lacks coherence. The court below found that "[t]his argument merits little discussion." *Winters*, 2001 WL 1491581 at * 7. The court below held that the Equal Protection Clause did not apply in the first instance, because the tie-breaker provision did not create any classifications

of any kind. *Id.* The court below was correct, and in their attempt to overcome this argument, Appellants even more clearly expose the flaw in their position. This Court should affirm the court below on the equal protection claim for two reasons: first, Appellants lack standing to raise this claim; and second, in any event, the tie-breaker provision does not single out any particular group of people for disparate treatment and, therefore, cannot violate equal protection.

1. Appellants Lack Standing To Raise An Equal Protection Claim

In response to the lower court's ruling that the tie-breaker provision does not create any particular classification for disparate treatment, Appellants write that: "Although Section 3(b) does not single out one political party *per se*, it, *by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process." (Jurisd. Stmt. at 14 (emphasis in original).) Appellants have all but conceded that they lack standing to bring this equal protection claim. In order to complain of an allegedly invidious classification, a plaintiff must be a member of that class — he or she must actually suffer a personal, concrete injury from the classification made by the state. *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (plaintiffs lacked standing to pursue racial gerrymandering claim against redistricting scheme because they were not personally aggrieved by the gerrymander). Appellants, first of all, do not identify themselves in their Amended Complaint as members of *either* political party. (Amended Complaint, ¶¶ 4-9.) Moreover, even had they done so, they have conceded that one political party is not singled out *per se* — they argue, instead, that *one* of the major political parties will be injured, but they fail to identify which political party.

If Appellants are attacking this tie-breaker provision as a facial challenge, as their argument implies (Jurisd. Stmt.

at p. 14 (noting that the provision, "*by design*, guarantees that one political party . . . will be excluded") (emphasis in original), then they lack standing to do so because they cannot show an injury to themselves based on the provision on its face. Appellants cannot be members of both political parties at the same time, and they cannot point to a specific, concrete injury from a redistricting provision that may, or may not, allegedly impact their rights. Moreover, because the Illinois Constitution does not dictate that a Republican or Democrat be placed into the two-person pool for random selection, it is by no means clear that one of the major political parties will benefit from the tie-breaking member — nor, as discussed above, is it even clear that the ninth member will cast the "decisive" vote even if he or she were a member of one of the major political parties. Thus, Appellants lack standing to raise a facial challenge to Article IV, § 3 of the Illinois Constitution.

If Appellants are attacking this provision *as applied*, they still lack standing because they do not allege that the tie-breaking provision, in this redistricting cycle, will operate to injure them. That is, they do not identify the "losing" political party in the tie-breaker in the 2001 redistricting cycle and they do not allege that they belong to that "losing" party. A member of the Democratic Party cannot assert the rights of a Republican, nor vice versa, and this Court cannot be left to guess which party "lost" the tie-breaker and which is the political party to which Appellants belong.

Standing is a jurisdictional requirement of Article III of the Constitution. This argument can be raised by the parties at any time, or by the Court *sua sponte*. *Adarand Constructors, Inc. v. Mineta*, __ U.S. __, 122 S. Ct. 511, 514 (2001). As plaintiffs below, it is Appellants' obligation to clearly establish standing under Article III to invoke federal jurisdiction. *Bennett v. Spear*, 520 U.S. 154, 162 (1997). Their failure to do so dooms their equal protection claim.

2. Appellants Do Not, And Cannot, Establish An Equal Protection Violation

To state a claim for equal protection, Appellants must show that the people of the State of Illinois, in ratifying Article IV, § 3 of the Illinois Constitution, have singled out a particular class for disparate treatment — *i.e.*, that similarly situated people are being treated differently. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). Not only have Appellants failed to assert that they belong to a supposedly "disadvantaged" class, they have not asserted that any particular class is being singled out. Appellants devote space in their brief to only generalized equal protection principles. There is certainly a good deal of equal protection case law from this Court in the context of redistricting, but those cases concern the one-person, one-vote doctrine, as well as racial and political gerrymandering claims. None of the cases remotely touch on the issue presented herein, dealing not with the content of a redistricting *plan* but with the content of the redistricting *commission*.

Appellants make several misstatements of law and fact in claiming that the tie-breaker provision "*by design*, guarantees that one political party and the members of that party will be excluded from the redistricting process." (Jurisd. Stmt. at 14.) (emphasis in original) First, the "minority" members of the Commission are not excluded from the process, by definition. Two of them are General Assembly members, who had the opportunity to participate in attempts by the General Assembly to enact a plan — a step that *predates* the Commission process altogether. Further, all four of the "minority" members of the Commission had from July 1 to August 10 of the relevant year — the time in which the eight-member Commission operates — to achieve compromise. *See* Ill. Const. 1970, Art. IV, § 3(b).

Second, Appellants' position constitutes a complete inversion of equal protection principles. They cannot identify a particular class that is "singled out" for disparate treatment; they identify *two potential classes*, and admit that the best they can do is state that one of them — which one they do not know — will be "singled out" by the process. Appellants clearly fail to state a claim under the Equal Protection Clause.

Finally, Appellants fail to acknowledge the obvious — that each of the two political parties is treated *alike* under the tie-breaking provision. Unlike other states, where a particular governmental official or body is given the opportunity to pick the plan or pick the tie-breaker, in Illinois, the Supreme Court selects two individuals not of the same political party. Assuming that these two members in the pool are composed of one Democrat and one Republican, each political party has the same opportunity — a 50/50 chance — to have the ninth member placed on the Commission. Moreover, because the Illinois Constitution does not direct that individuals affiliated with the major political parties be part of the pool, it is not even clear that *either* party will gain an advantage. The Equal Protection Clause is certainly not offended when similarly situated persons are treated equally.

The judiciary's role is not to serve as the initial arbiter of drafting legislative maps, but rather to serve as the final step in the process to ensure that the map that was drawn meets constitutional principles. The U.S. Constitution ensures that a redistricting plan will not dilute votes due to a difference in the populations of districts; that it will not be based predominately on racial considerations; and that it will not have the effect of shutting one political party out of the political process as a whole. Simply put, the U.S. Constitution has been held to apply to the content of the *map* drawn, whether by a legislature, a commission, or a court. But the Constitution does not dictate to the states any terms regarding

the content of the *body* that draws the plan. Because Appellants do not allege that the final redistricting plan adopted by Illinois violates the one-person, one-vote principle, or that it constitutes a racial or political gerrymander, the Constitution is satisfied, however the plan was drawn.

Appellants' assertion of a fundamental right, or a significant impairment of their right to vote, strains credibility. Illinois' use of random selection to break a deadlock on the Commission is entirely logical and rational. Appellants' equal protection claim lacks jurisdiction and, in any event, does not state a claim which this Court should address.

CONCLUSION

For the foregoing reasons, the Appellee, John Tully, respectfully requests that this Court dismiss this appeal and/or affirm the decision of the three-judge district court.

Respectfully submitted,

WILLIAM J. HARTE*
WILLIAM J. HARTE, LTD.
111 West Washington
Suite 1100
Chicago, Illinois 60602
(312) 726-5015

DAVID W. ELLIS
WILLIAMS, COLLINS & BAX, P.C.
20 North Wacker Drive
Suite 3230
Chicago, Illinois 60606
(312) 372-3311

Counsel for Appellee John Tully

* *Counsel of Record*